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Case Notes

R. (on the application of Cobalt Data Centre 2 LLP) v HMRC: a Cobalt white elephant

Summary

Section 298(1) of the Capital Allowances Act 2001 (CAA 2001) offered taxpayers Enterprise Zone allowances (EZAs) as an inducement to taking on the financial risks of newbuild industrial developments in disadvantaged areas, without a tenant. It extended their availability for a further 10 years after expiry of the 10-year life of an enterprise zone (EZ), provided that the qualifying "expenditure is incurred under a contract entered into within" the first 10 years ("the proviso"). According to the Court of Appeal[1] changes made to a development, resulted in two building contracts with the claimed expenditure incurred under the second, being a "separate" contract made too late to qualify for EZAs. The three judgments are not consistent with each other, and decided by different routes that the changes by their nature and extent were so different from the initial plan that they resulted in no EZAs. Taxpayers, having built what parliament wanted, are left to take the losses without the safety net of the statutory inducement. If the offer made to taxpayers was to be restricted, this should as a matter of certainty and fairness have appeared clearly in the statutory words. The decision may affect many other developments by taxpayers who ran financially unviable risks. Investors include those who have died leaving dependants, are in retirement, and on pensions.

Statutory interpretation depends on the words and their purpose. Common law contractual principles provide for freedom of contract to vary a contract. On whether there is rescission or variation these have been established by judicial precedent including in the House of Lords, the Privy Council, the Supreme Court, and the High Court of Australia, speaking with one voice. The errors in the judgments produce an EZ tax regime inconsistent with the words and purpose of the statute, and common law principles. This case produces uncertainty and risk of chaos on tax and other statutes where the date of conclusion of a contract is critical, and there have been contractual changes. It places a black cloud over parliament offering tax inducements to achieve investment in the UK economy rather than risking public money on a white elephant. Appellate error on applying established common law contractual principles to tax legislation has been reversed by the High Court of Australia in authority[2] not mentioned by the judgments. Taxpayers are seeking correction in the UK Supreme Court.

[1] *R. (on the application of Cobalt Data Centre 2 LLP) v HMRC* (*Cobalt CA*) [2022] EWCA Civ 1422; [2022] S.T.C. 2041.
[2] *FCT v Sara Lee Household and Body Care* [2000] HCA 35; (2000) 201 CLR 520.

The statute and the facts

EZs had a life of 10 years from the date of designation, and to qualify for EZAs, time was running out under the 1990 legislation. A taxpayer had to be "legally and unconditionally liable to pay" expenses "incurred" on a new building in the EZ, within its 10-year lifetime. Section 298(1)(b) of the CAA 2001 added a new alternative time limit:

> "(1) …. the time limit for expenditure on the construction of a building on a site in an enterprise zone is—
>
> (a) 10 years after the site was first included in the zone, or
>
> (b) if the expenditure is incurred under a contract entered into within those 10 years, 20 years after the site was first included in the zone."

The proviso to (b) reflected wording used in sections 1 and 6 and section 10A of the Capital Allowances Act 1990.[3]

In 2001 there could still be several years to run of the first 10 years. Lewison LJ at paragraph 42 said "[t]he expectation must have been that the contracting party was committed within [the first 10 years] to incur qualifying expenditure".[4] Construction projects might take years. A "golden" contract could be conditional on whether a developer chose to proceed. The proviso operates at the time of incurring the expenditure. EZ designations could be exploited, with qualifying expenditure being incurred up to 10 years after expiry of an EZ's lifetime. The new alternative time limit allowed EZAs for qualifying expenditure on entirely new development projects. Contrary to Lewison LJ at paragraph 42, the contract did not have to require qualifying expenditure to be incurred in what remained of the first 10 years, or that the taxpayer would be "committed" within that period to incur it.

The same general principles apply to interpretation of all statutes. The words are of central importance. The context and purpose of the provision are important.[5] The "context" includes the existing state of the law.[6] There is no principle that they should be interpreted to maximise revenue from tax.[7]

Section 298(1)(b) is applied when claimed expenditure is "incurred", possibly years after "a contract" is "entered into". Plans may change to add extra buildings, accommodating changing needs of industry and markets. Locations of buildings may change. It was to be expected that a multimillion-pound building project often with no committed tenant might have to be changed. Settlements of disputes may agree changes to the financial terms. The "mischief" to be remedied,[8] was under investment in disadvantaged areas. The government avoided the risk of using public money for a white elephant and obtained what was required.

[3] Sarah Gillings, "Finance Bill notes: enterprise zone allowances: clause 56 and Schedule 12" [1992] B.T.R. 234.
[4] *Cobalt CA* [2022] EWCA Civ 1422 at [42].
[5] *R. (on the application of O (A Child)) v Secretary of State for the Home Department* [2022] UKSC 3; [2022] 2 W.L.R. 343 at [28]–[29]; *R. v Luckhurst (Andrew John)* [2022] UKSC 23; [2022] 1 W.L.R. 3818 at [23].
[6] *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384 at [88] (High Court of Australia).
[7] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27.
[8] *Heydon's case* (1584) 3 Co. Rep. 7; (1584) 76 E.R. 637.

Often established common law contractual principles are to be applied, being part of the context, providing predictability and certainty. In *FCT v Sara Lee Household and Body Care*[9] the issue was, at what time was the contract made under which there had been disposal chargeable to capital gains tax. The High Court of Australia, allowing the appeal, held that the issue to be decided on the statute was governed by common law contractual principles on variation: "…the determining factor must always be the intention of the parties as disclosed by the later agreement…",[10] that under the statute the disposal was under the original contract as varied, the relevant time being when the original contract was made.

The alternative would be restrictions not imposed at common law, unexpressed in the statute and which, through chilling updating and responding to change, could interfere with parliament's objective. Parliament would not have intended that its words should be restricted to produce what in substance would be retrospective taxation, or for taxpayers and their families to face the consequences of uncertainty, including litigation. A minor change infringing an unarticulated restriction, could transform the financial risks. The public was intended to rely with confidence on the statute. That a restriction was not written into the statute was a clear indication that parliament did not intend it. If the words are clear it would be "…a confidence trick…and destructive of all legal certainty…"[11] if the private citizen could not rely upon them.

HMRC's Skeleton Argument before the Court of Appeal at paragraph 3a, repeated at paragraph 30:

> "Section 298 CAA 2001 incorporates the general law of contract by use of the term '*under a contract*'. It follows that the law of contract distinguishing variations merely qualifying the existing contract…from…rescissionary variations…must be applied."[12]

Based on the statutory words, and with precedent,[13] HMRC stated that the proviso was governed by established common law contractual principles.

LLPs were formed in January 2011 for building Cobalt Data Centre 2 (DC 2) and Data Centre 3 (DC 3). Members of the public were induced by the availability of EZAs under subsection (b) to take on what was otherwise an unattractive risk. Events on 1 April 2011 concerned intended changes to the construction contract between developer (employer) and contractor. IBAs were being phased out from 6 April 2011 under the Finance Act 2008.

The golden contract, under which the taxpayers claimed they had "incurred" the expenditure, was made in February 2006. It had alternative "works options" exercisable by a Notice to Proceed changing what the developer could require to be built, and where in the EZ, under the golden contract. It included a JCT form, clause 12 of which allowed the employer to impose variations on the contractor. DC 1 was being built under Change Order 1 to the golden contract on 20 November 2009. Change Order 2,[14] dated 1 April 2011, purportedly added a new building, Data Centre 2, "in the vicinity" of the site being used for Data Centre 1, "around 20 metres" away.

[9] *FCT v Sara Lee Household and Body Care* (2000) 201 CLR 520 at 533–534.
[10] *FCT v Sara Lee Household and Body Care* (2000) 201 CLR 520 at 533–534.
[11] *Fothergill v Monarch Airlines Ltd* [1981] A.C. 251 HL at 279–280.
[12] HMRC Replacement Skeleton Argument (16 July 2021) used before the Court of Appeal in argument.
[13] Examples of the common law being applied are the Statute of Frauds, Moneylending legislation and tax legislation.
[14] *R. (on the application of Cobalt Data Centre 2 LLP) v HMRC* (*Cobalt UT*) [2019] UKUT 342 (TCC); [2020] S.T.C. 23 at [63].

The Notice to Proceed given on 1 April 2011 was with "the works in…Change Order No 2" in "accordance with" the golden contract, identifying a works option under that contract as varied. Data centres changed from manufacturing microchips, the original intended use, no longer in demand. The Upper Tribunal UT) found that "…from a construction perspective, the differences were not significant…".[15]

The UT at paragraphs 72 to 85 and Court of Appeal at paragraphs 64 to 66, 137xii, 145 and 151 rejected LLP's argument that Change Order No 2 on 1 April 2011 was effective within clause 12: purported use of clause 12 by the developer was outside the clause,[16] and mistaken.[17] The contractor had to agree to a further variation.

The contractor's invoice dated 1 April 2011 to the developer was for "[p]ayment of construction sums due under [the golden contract], and pursuant to Employers Change Order No 2 in respect of a Data Centre DC 2", of £54,845,150. This was pre-paid to the contractor, who retained it. On 4 April 2011, the LLP executed a "Sale and Development Agreement relating to the sale and development of" DC 2 (the SDA) with, among others, the developer and the contractor. Clause 2.3 stated that the developer had agreed to procure the construction of the building (DC 2) and the carrying out of the building works "on the terms recorded in this Agreement". Clause 2.5 stated that the developer had paid £54.8 million to the contractor under the golden contract. Clause 3 provided that in consideration of the developer (also the employer under the JCT form) assigning the benefit of the golden contract and fulfilling its obligations under the SDA, the LLP would pay the developer £153.7 million. On the same day, pursuant to the SDA, the developer entered into a deed of assignment under which it assigned rights under the golden contract covering DC 2 to the LLP. These documents provided for the golden contract to apply to DC 2. The events of 1 and 4 April were redolent of having been pre-planned.[18]

DC 2 and DC 3 were built, not attracting a tenant. Subsequently HMRC challenged claims for EZAs. HMRC disputed before the UT whether (1) as a result of changes the golden contract had been varied and (2) the expenditure incurred on construction of the buildings was "under" the golden contract.[19]

The judgments

At common law, whether an agreed change results in "variation" of a contract is a question of interpretation of the subsequent contract. The Statute of Frauds required certain contracts if they were to be enforceable by action to be in writing. A written contract could be rescinded by an oral agreement because the oral agreement was a valid agreement, albeit itself not actionable. If a written contract was rescinded orally, the original written agreement ceased to be enforceable. Viscount Haldane in *Morris v Baron & Co* said:

[15] *Cobalt UT* [2019] UKUT 342 (TCC) at [108].
[16] *Cobalt CA* [2022] EWCA Civ 1422 at [119] per Lewison LJ.
[17] *Cobalt CA* [2022] EWCA Civ 1422 at [151] per Andrews LJ.
[18] *Cobalt CA* [2022] EWCA Civ 1422 at [119], final sentence, per Lewison LJ.
[19] *Cobalt UT* [2019] UKUT 342 (TCC) at [27].

> "What is, of course, essential is that there should have been made manifest the intention in any event of *a complete extinction* of the first and formal contract, and not merely the desire of an alteration, *however sweeping*, in terms which still leave it subsisting."[20]

The Supreme Court in *Plevin v Paragon Personal Finance Ltd (No 2)* (*Plevin*)[21] approved this.

Lord Sumner in *British & Beningtons Ltd v North West Cachar Tea Co Ltd*,[22] said as a matter of "formal logic" every variation however trivial results in a new contract being the original contract as varied, and:

> "The question is whether the common intention of the parties on [the date of the contractual change] was to 'abrogate', 'rescind', 'supersede' or 'extinguish' the old contracts by a 'substitution' of a 'completely new' and 'self-contained' or 'self-subsisting' agreement, 'containing as an entirety the old terms, together with and as modified by the new terms incorporated' and, '….the discharge of the old contract must depend on intention, tested in the manner settled in *Morris v. Baron & Co.*'."[23]

The House of Lords decided that the original sale of tea contracts had not been frustrated by port congestion, resulting in the tea going to other ports. Also rejected was that the contracts had been terminated by the buyers by an accepted repudiation or anticipatory breach. The changes were not so extensive that they had gone to "the root of the contract". This indicated that they were agreed to enable the existing contracts to continue and be performed, and that there had been intended a "variation", not rescission.

Where parties did not consider the point, the question notoriously, could be of considerable difficulty.[24] Judges may explain a decision by reference to the facts, including the extent of changes. Textbooks[25] have looked at cases seeking to help on when that intention might be found. What is "essential" is the objective intention applying the test stated by Viscount Haldane, applied by Lord Sumner, and approved by the Supreme Court.

In contrast HMRC's argument was:

> "106. …That the question must be approached in two stages. Stage 1 enquires: what have the parties agreed? That is a question of interpretation and to that extent may be described as a question of the parties' intention. But stage 2 is different. Stage 2 simply enquires: what is the legal effect of what the parties have agreed? That is not dependent on professed intention at all."[26]

HMRC argued the changes

[20] *Morris v Baron & Co* [1918] A.C. 1 HL at 18, emphasis added.
[21] *Plevin v Paragon Personal Finance Ltd (No 2)* (*Plevin*) [2017] UKSC 23; [2017] 1 W.L.R. 1249 at [13].
[22] *British & Beningtons Ltd v North West Cachar Tea Co Ltd* (*British & Beningtons Ltd*) [1923] A.C. 48 HL at 68–69.
[23] *British & Beningtons Ltd* [1923] A.C. 48 HL at 69.
[24] *Chitty on Contracts*, 34th edn (London: Sweet & Maxwell, 2022), para.25-030 cited by Lewison LJ in *Cobalt CA* [2022] EWCA Civ 1422 at [73]; in *Wadlow v Samuel (aka Seal)* [2007] EWCA Civ 155 at [35] per Toulson LJ.
[25] Cited by Lewison LJ in *Cobalt CA* [2022] EWCA Civ 1422 at [73]–[75].
[26] *Cobalt CA* [2022] EWCA Civ 1422 at [106].

> "…were of such magnitude that they amounted in law to a new contract which was made outside the 10-year period. Accordingly, any expenditure was not incurred under 'a contract' entered into within the 10-year period."[27]

HMRC's argument,[28] based on "the general law of contract", was that the UT had had to compare the original terms before change, with those after change. Whilst this might be relevant to whether there was intended rescission, the governing test is that of objective intention.

Factors which may be relevant to this on particular facts of one case may not assist in another. In *Shell UK Ltd v HMRC* the special commissioners,[29] listing matters identified as relevant in judgments on different facts, stated:

> "…Such an intention will be implied where the new contract either entirely or to an extent goes to the very root of the first contract and is inconsistent with it…It also appears that there will be a rescission where the second contract deals with the same subject matter as the first but in a different way so that it is impossible that the two should both be performed or where the conditions in the first contract have been so changed by the second contract that there is a substantial inconsistency between the two."[30]

The UT at paragraphs 96 and 104 was correct not to adopt this as a statement of general principle, rejecting that "…even where both parties share a common intention not to rescind a contract, that contract could nevertheless be rescinded by the parties agreeing fundamental changes to it."[31]

Lewison LJ said:

> "88. The test that Lord Sumner in fact applied,…looked at a comparison between the old terms and the new…the acid test was whether the changes went to the root of the original contract or were inconsistent with it."[32]

Lord Sumner, quoted above, adopted Viscount Haldane's test, which is supported by the Privy Council,[33] Toulson LJ,[34] the Supreme Court in *Plevin*,[35] and the High Court of Australia.[36] Lord Dunedin did not differ from the other judges in *Morris v Baron & Co*.[37] Newey LJ at paragraph 136(vii) also misformulated the test. On this the UT at paragraphs 96 and 104 were correct, and Lewison LJ at paragraph 117 second sentence erred in finding them to be "wrong".

[27] *Cobalt CA* [2022] EWCA Civ 1422 at [37(ii)].
[28] HMRC Skeleton Argument in the Court of Appeal at [3(b)–(e)].
[29] *Shell UK Ltd v HMRC* (*Shell*) [2008] S.T.C. (S.C.D.) 91; [2007] SPC 00624.
[30] *Shell* [2008] S.T.C. (S.C.D.) 91; [2007] SPC 00624 at [106].
[31] *Cobalt UT* [2019] UKUT 342 (TCC) at [104].
[32] *Cobalt CA* [2022] EWCA Civ 1422 at [88].
[33] Delivering the judgment of the Privy Council in *United Dominions Corp (Jamaica) v Shoucair (Michael Mitri)* [1969] 1 A.C. 340 which applied *Morris v Baron & Co* [1918] A.C. 1 HL to moneylending legislation.
[34] *Wadlow v Samuel (aka Seal)* [2007] EWCA Civ 155 at [35]–[39].
[35] *Plevin* [2017] UKSC 23 at [13].
[36] Citations in *Alcan Gove Development Pty Ltd v Thiess Pty Ltd* [2008] NTSC 12 at [9]–[11].
[37] *Cobalt CA* [2022] EWCA Civ 1422—Lewison LJ at [78] cited *Morris v Baron & Co* [1918] A.C. 1 HL at 25–26 and not 28, see *Cobalt UT* [2019] UKUT 342 (TCC) at [94].

Lewison LJ at paragraph 57 and Andrews LJ at paragraph 154 referred to *Blue Circle Industries Plc v Holland Dredging Co (UK) Ltd*.[38] A tender was accepted for a dredging contract which included arbitration clauses, and then a second tender was accepted for construction of an artificial island without an arbitration clause. The dispute was whether the dispute under contract 2 was within contract 1's arbitration clauses. Each tender was separate and self-contained. It was argued that contract 2 was a "variation" of contract 1, and therefore disputes concerning it were subject to the clauses. The Court of Appeal held that contract 2 was not within the scope of the variations clause in contract 1, and the dispute did not fall within contract 1's arbitration clauses. It has been left on bookshelves for nearly 50 years, uncited in a judgment, and is authority for no general principle.

Citing *Street v Mountford*,[39] Lewison LJ said[40] that parties might label an agreement as a licence but have for the purposes of the Rent Acts, created a lease. A "false label" may be used, the parties' intention being frustrated by a statute.[41] The cases at paragraphs 108 to 116 show that the significance of the objective intention of the parties depends on the issue to be resolved. The possible qualification in *Plevin*, at paragraph 13, was in the context of the legislation.[42]

Seven Cable Television Pty Ltd v Telstra Corp Pty Ltd (*Seven Cable*),[43] a first instance decision in the Federal Court of Australia, was cited by Lewison LJ at paragraph 110. In *Seven Cable*, Tamberlin J said:

> "132. …The question whether there has been a 'variation' is dependent on the intention of the parties, objectively determined, from the words of the contract. Regard must be had to the nature and extent of any differences.…"[44]

and

> "…if the changes are of such a nature and degree as to give rise, on objective comparison, to a variation [meaning rescission] in law the mutual declarations of the parties as to their intention will not circumvent that legal consequence. This is particularly so where the subsistence of a statutory right,…is in issue."[45]

Parties free from a statutory restriction, can agree whether a subsequent agreement will operate as a variation. A declaration in a contract that there is variation, is itself relevant to what the parties objectively intended. Normally contracts mean what they say.[46] The documents had been drafted professionally. The "surrounding circumstances" of the proviso and its effect if the expenditure was not incurred under the golden contract, known to the developer and contractor

[38] *Blue Circle Industries Plc v Holland Dredging Co (UK) Ltd* (1987) 37 B.L.R. 40 CA.
[39] *Street v Mountford* [1985] A.C. 809 HL.
[40] *Cobalt CA* [2022] EWCA Civ 1422 at [106] and [115].
[41] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52; [2012] 1 A.C. 955 at [17].
[42] The last sentence concerned statutory restriction, Lord Hodge dissenting on its scope at *Plevin* [2017] UKSC 23 at [34]–[37].
[43] *Seven Cable Television Pty Ltd v Telstra Corp Pty Ltd* (*Seven Cable*) 171 ALR 89; [2000] FCA 350 at [132].
[44] *Seven Cable* 171 ALR 89; [2000] FCA 350 at [132].
[45] *Seven Cable* 171 ALR 89; [2000] FCA 350 at [132] citing Lewison, *The Interpretation of Contracts*, 2nd edn (1997), para.8.07 on "False Labels", and *Street v Mountford* [1985] A.C. 809 HL.
[46] *Arnold v Britton* [2015] UKSC 36; [2015] A.C. 1619 at [17].

as found in the UT at paragraphs 106 to 107, strongly reinforced that the documents meant what they said.

The ratio in *Seven Cable* was:

> "134. …The nature and extent of the variations between the arrangements…are so extensive as to make it clear that a new independent contract was intended".[47]

As Wilson and Dawson JJ said in *Dan v Barclays Australia Ltd*

> "if [a change] is to have the effect of rescission of the whole contract, the rescission must be express or by necessary implication and the determining factor must always be the intention of the parties *as disclosed by [the]contract when varied."*[48]

Seven Cable was generalised at [110] as showing a "two-stage approach" favoured "in Australian Courts" with a second stage depending on the nature and extent of the changes made and not intention. For common law, this is inconsistent with binding precedent in England and with the test in the High Court of Australia in *Dan v Barclays Australia Ltd*[49] which formed part of the ratio in *Seven Cable* and has been subsequently approved in that court. A second stage requirement might be found in statutory words if sufficiently clear and certain, but that was inconsistent with the test being for application of the common law.

Lewison LJ held

> "…a contract to construct a materially different building on a wholly different site and at a substantially different price satisfies whatever is the right test to result in a new contract rather than a variation."[50]

This left the test unspecified. His "essential points"[51] did not identify, and interpret, the terms of the contract. Based on "false label" cases, and the "second stage", Lewison LJ found error made by the UT.[52] One is left wondering what are the extent of changes which, according to Lewison LJ, preclude contractual variation at common law.

Newey LJ said that his reasons "differ slightly from Lewison LJ's".[53] He accepted that the tax position could be a "background" circumstance relevant to an objective assessment of what the parties objectively intended.[54] Newey LJ said:

> "139. …I am prepared to proceed on the basis that, one way or another, the Contractor became contractually obliged to undertake the works identified in Change Orders 2 and 3 for the sums specified in them independently of the SDAs."

[47] *Seven Cable* 171 ALR 89; [2000] FCA 350 at [134].
[48] *Dan v Barclays Australia Ltd* (1983) 57 ALJR 442 (High Court of Australia) at 449, emphasis added.
[49] *Dan v Barclays Australia Ltd* (1983) 57 ALJR 442 at 449, approved in *FCT v Sara Lee Household and Body Care* (2000) 201 CLR 520 at [23]–[24]; also *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* [1957] HCA 10; (1956–57) 98 CLR 93 at 135, and 144 per Taylor J. These were followed in *Alcan Gove Development Pty Ltd v Thiess Pty Ltd* [2008] NTSC 12 at [9]–[10].
[50] *Cobalt CA* [2022] EWCA Civ 1422 at [120] and [121].
[51] *Cobalt CA* [2022] EWCA Civ 1422 at [123].
[52] *Cobalt CA* [2022] EWCA Civ 1422 at [115] and [118].
[53] *Cobalt CA* [2022] EWCA Civ 1422 at [134].
[54] *Cobalt CA* [2022] EWCA Civ 1422 at [136(vi)] and [144].

> "142. …In reality, the Developer and Contractor were proceeding on the basis that Change Orders were being given pursuant to the existing Golden Contract and will have seen no need to vary it in any other way. Nor…is there any other evidence which could warrant the conclusion that there was a variation of the Golden Contract."
>
> "146. …The Developer and Contractor saw no need either to vary or to rescind the Golden Contract, and it seems to me that they did not do so. The correct inference is that they entered into fresh contractual arrangements which did not involve either variation or rescission of the Golden Contract…the Change Orders created a new contract that stood separate from the Golden Contract."[55]

(1) The common law is sufficiently flexible to allow a court to find that a building was built on agreed terms, and what the terms were without identifying an offer and acceptance. In "Contract law: fulfilling the reasonable expectations of honest men",[56] Lord Steyn who had delivered the leading judgment in *G Percy Trentham Ltd v Archital Luxfer Ltd*,[57] wrote that

> "…[t]he greater the evidence of reliance, and the further along the road towards implementation the transaction is, the greater the prospect that the court will find a contract made and do its best, in accordance with the reasonable expectations of the parties, to spell out the terms of the contract."[58]

That a building specified by the developer was constructed by the contractor for £54.8 million invoiced by the contractor, paid by the developer to, and retained by, the contractor, are plainly very relevant factors pointing towards the parties having concluded a contract.[59]

(2) Lewison and Newey LJJ,[60] unlike Andrews LJ,[61] held that DC 2 and DC 3 were built under a contract.

(3) When the terms of a contract are found in documents and conduct, there must be considered all the facts, without drawing a line at a particular point of time and considering nothing later.[62] What was stated expressly concerning the golden contract in Change Order No.2, the Notice to Proceed, and the invoice, together with payment and retention of the contract sum by the contractor, which built the data centres, found as facts by the UT, led to the conclusion that the contractual terms were to be found in these documents of 1 April 2011. This was reinforced by the documents of 4 April 2011, which implemented them.

(4) As stated by Newey LJ[63] that the proviso would also have been relevant to proof of subjective intent or motivation, did not in any way derogate from its being part of the "surrounding circumstances".

[55] *Cobalt CA* [2022] EWCA Civ 1422 at [139], [142] and [146].
[56] Lord Steyn, "Contract law: fulfilling the reasonable expectations of honest men" (1997) 113 L.Q.R. 433.
[57] *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep. 25 CA.
[58] Lord Steyn, "Contract law: fulfilling the reasonable expectations of honest men" (1997) 113 L.Q.R. 433, 434–435.
[59] *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* (*RTS Flexible Systems Ltd*) [2010] UKSC 14; [2010] 1 W.L.R. 753 at [54].
[60] *Cobalt CA* [2022] EWCA Civ 1422 at [70] and [139].
[61] *Cobalt CA* [2022] EWCA Civ 1422 at [148] and [155].
[62] *RTS Flexible Systems Ltd* [2010] 1 W.L.R. 753 SC at [49].
[63] *Cobalt CA* [2022] EWCA Civ 1422 at [136(vi)].

(5) Newey LJ[64] took only the scope of the works from Change Order No.2. That the golden contract was varied was shown by the documents of 1 April 2011 reinforced by those of 4 April 2011, that Change Order No.2 was for a variation of the golden contract, and that the assignment of the benefit of the golden contract was consistent only with DC 2 being built under that contract.

(6) That the employer and the contractor agreed that DC 2 and DC 3 were to be built under a non-golden contract imputes to them an objective intention (a) inconsistent with the express terms of the documents used on 1 April 2011 reinforced by the SMA and the assignment of the benefit of the golden contract on 4 April 2011; (b) to nullify the known expectations of the investors on the faith of which they had already invested; (c) to expose investors to financial risks which they knew the investors had not agreed to bear; and (d) to assign to the LLP of those unsuspecting investors the benefit of the golden contract, useless for tax purposes, and not governing construction of the data centres, being part of what was required by the LLP in return for a price of £153.7 million. There is to be preferred the more reasonable interpretation. The more unreasonable the consequences of a particular interpretation the less likely the parties could have intended it.

Andrews LJ who agreed with Lewison LJ,[65] questioned whether the expenditure on DC 2 and DC 3 had been incurred under any contract at all. This was unrealistic.[66] It was inconsistent with the analysis of Lewison LJ,[67] and that of Newey LJ,[68] and was unreasoned.

At paragraph 154 Andrews LJ said:

> "Applying the approach of Purchas LJ in the *Blue Circle* case, the employer could not have ordered the work required by it against the wishes of the Contractor as a variation under clause 12. Therefore, any agreement under which such work was carried out could not constitute a variation but had to be a separate agreement."[69]

First, an agreed variation may be produced by exercising a contractual option, or by mutual agreement. Excluding clause 12 did not exclude mutual agreement. The words "could not constitute a variation" were a non sequitur.

Secondly, the words "a separate contract" would produce two "separate" contracts, only one of which was the golden contract. Whether this was so contractually, should have depended on what the parties had objectively intended in the subsequent agreement.

The errors made in paragraph 154 excluded the possibility that the parties had mutually agreed for the construction of DC 2 at the pre-paid price as specified in Change Order No.2 and invoiced, by way of variation to the golden contract. If so, they could not also have agreed for it to be built under a separate agreement. In paragraph 155 Andrews LJ said that "…if the Contractor agreed to do the work for [the pre-paid] price" the relevant expenditure had not been incurred under the golden contract but under a "separate agreement" because of the changes. This imposed on the parties a conclusion based on the extent of the changes, regardless of the parties' intention.

[64] *Cobalt CA* [2022] EWCA Civ 1422 at [139].
[65] *Cobalt CA* [2022] EWCA Civ 1422 at [148].
[66] Lord Steyn, "Contract law: fulfilling the reasonable expectations of honest men" (1997) 113 L.Q.R. 433, 435.
[67] *Cobalt CA* [2022] EWCA Civ 1422 at [70].
[68] *Cobalt CA* [2022] EWCA Civ 1422 at [139].
[69] *Cobalt CA* [2022] EWCA Civ 1422 at [154].

HMRC's agreement in argument that common law contractual principles applied, was undermined by errors, producing a result inconsistent with the statute, and the terms of the contract.

Steven Gee[*]

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